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IN THE
COURT OF APPEALS OF INDIANA

CLIFFORD EDWIN RESKE,	)	
	)	
Appellant,	)	
	)	
and	)	No. 30A05-0701-CV-5
	)	
MICHELLE (RESKE) HONEYCUTT,	)	
	)	
Appellee.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0110-DR-524

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Clifford Reske ("Father") appeals a custody modification order pertaining to E.R., J.R., and Er.R., his three children with Michelle Reske Honeycutt ("Mother"). We affirm.

Issues

Father raises four issues, which we consolidate and restate as the following three issues:

I. Whether he was denied procedural due process;

II. Whether the order for split custody is an abuse of discretion; and

III. Whether Mother's parenting time with E.R. should have been restricted to exclude the presence of Mother's husband.

Facts and Procedural History

Father and Mother were divorced on December 18, 2001. They agreed to share joint legal and physical custody of their three children, E.R., born November 11, 1990, Er.R., born November 3, 1994, and J.R., born January 5, 1996. Each of the parents remarried.

During March of 2003, E.R. alleged that her stepfather, Jason Scott Honeycutt ("Honeycutt"), had sexually molested her. On March 28, 2003, Father filed a petition for emergency modification of custody. The trial court ordered a custody evaluation to be performed by Dr. Randall Krupsaw ("Dr. Krupsaw"). Father was given the temporary physical custody of E.R. and the joint custody arrangement as to Er.R. and J.R. was continued. Finally, the interim order provided that Honeycutt could not be present during Mother's parenting time with E.R.

On December 31, 2003, Mother filed an emergency petition for custody modification of E.R. as Father was to be deployed to Iraq. After a hearing conducted on January 8, 2004, the trial court temporarily placed E.R. with her paternal grandparents. Custody proceedings were delayed pending Father's return from Iraq and the trial court's receipt of the custody evaluation report from Dr. Krupsaw. In December of 2005, Dr. Krupsaw recommended that Father have primary physical custody of E.R. and the joint custody arrangement be maintained as to Er.R. and J.R.

On August 3, 2006, the trial court conducted a custody modification hearing. Mother and Father stipulated to the admission of Dr. Krupsaw's report. Both parties presented witnesses, and the trial court conducted in camera interviews with each of the three children. On August 14, 2006, Father filed an "Offer to Prove Rebuttal Testimony." (App. 8.) On August 17, 2006, the trial court excluded the proffered rebuttal testimony.

On August 18, 2006, the trial court issued Findings of Fact, Conclusions of Law and Judgment, providing that Father would have custody of E.R. and Mother would have custody of Er.R. and J.R. The order provided that Honeycutt would not be left alone with E.R. but did not restrict Mother's parenting time with E.R. such that Honeycutt was excluded from being present. Father now appeals.

I. Due Process

Initially, Father contends that he was denied procedural due process because his time for cross-examination of Mother was limited and his proffered rebuttal evidence was excluded.

The Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Indiana Constitution both prohibit state action that deprives a person of life, liberty or property without a fair proceeding. Everhart v. Scott Co. Office of Family and Children, 779 N.E.2d 1225, 1229 (Ind. Ct. App. 2002), trans. denied. Due process minimally requires notice, an opportunity to be heard, and an opportunity to confront witnesses. Castro v. State Office of Family and Children, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), trans. denied.

At the outset of the custody hearing, the trial court advised the parties that each side would have two hours for the presentation of evidence. The parties were encouraged to enter into evidentiary stipulations where feasible, so that the court could concentrate on disputed factual issues and conduct in camera interviews with the children within the time allotted. Father's counsel conducted lengthy cross-examination of Mother before being given a five-minute warning. At the expiration of the allotted time, the trial court excused Mother as a witness and Father's counsel noted, without embellishment, that he had not completed his cross-examination. He objected without making an offer of proof regarding excluded evidence.

As such, it appears that Father was not deprived of notice, an opportunity to be heard, or an opportunity to cross-examine a witness against him. Rather, he was not given an expansion of the allotted time in light of his desire to continue to conduct cross-examination. Nor was he allowed to belatedly submit an affidavit from his mother, who did not appear at the custody hearing as a witness. He now essentially argues, without citation to relevant

authority, that he was entitled to as much time as he desired to establish his case and expose weaknesses in Mother's case.

From the record before us, we cannot discern any prejudice suffered by Father. At the time that cross-examination was closed, Father's counsel was exploring Mother's financial solvency and may have desired to continue asking questions on this issue. Nevertheless, the parties had already stipulated to Father's actual income and Mother's imputed income. Mother had already testified to some financial difficulty, and indicated that the mortgage and vehicle payments were due and unpaid. If counsel expected that further cross-examination would likely have garnered additional information relevant to any issue before the trial court, Father has not advised us of its substance.

The belated affidavit of Helen Reske ("Grandmother") does not directly contradict testimony offered at the custody hearing. Rather, it primarily details Grandmother's personal advice to E.R. about reporting sexual abuse and forgiving an abuser. The affidavit also indicates Grandmother's belief that Mother had advance knowledge of E.R.'s confirmation in the Lutheran Church. Father does not explain, nor can we discern from the face of the affidavit, how the exclusion of the affidavit prejudiced him or compromised his ability to present relevant evidence on a dispositive issue.

Father has not shown that he was denied due process or that he suffered prejudice to his substantial rights in the exclusion of evidence.

II. Modification of Custody

Indiana Code Section 31-17-2-21 governs the modification of a child custody decree, and provides in pertinent part:

(a) The court may not modify a child custody order unless:
    (1) the modification is in the best interests of the child; and
    (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.

Indiana Code Section 31-17-2-8 provides that the factors relevant to a custody order are as follows:

(1) The age and sex of the child.
(2) The wishes of the child's parent or parents.
(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
(4) The interaction and interrelationship of the child with:
    (A) the child's parent or parents;
    (B) the child's sibling; and
    (C) any other person who may significantly affect the child's best interests.
(5) The child's adjustment to the child's:
    (A) home;
    (B) school; and
    (C) community.
(6) The mental and physical health of all individuals involved.
(7) Evidence of a pattern of domestic or family violence by either parent.
(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Father contends that the trial court properly awarded him custody of E.R., but erred in awarding Mother custody of J.R. and Er.R. More specifically, he argues that the trial court did not properly focus upon the pertinent statutory factors, and that having the children in separate homes and school systems is detrimental to them.

We review custody modifications for an abuse of discretion and have a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). We do not substitute our own judgment for that of the trial

court, even where the evidence might support a different conclusion, but we will set aside a custody modification judgment only when it is clearly erroneous, that is, if it lacks evidence or legitimate inferences to support it. Id.

The trial court found (and both parents agreed) that the parents could not effectively communicate and amicably make childrearing decisions as required for the continuance of joint legal custody. In explaining its reasons for the split physical and legal custody arrangement, the trial court found that Mother had been the parent most involved in the children's activities. The trial court also observed that the two boys were already enrolled in a school system different from that of E.R., and that E.R. had made an allegation of sexual abuse against Honeycutt (which allegation was disbelieved by Mother and had not resulted in a criminal prosecution). Further, the trial court observed that Er.R. had pulled a knife on his stepmother.

As Father points out, the findings are sparse and do not directly address each of the statutory criteria. However, the findings are a reflection of the evidence presented, which primarily focused upon the family divisiveness existing after the allegations of sexual abuse. Mother did not believe E.R.'s allegations against Honeycutt. Dr. Krupsaw's custody evaluation report discloses that Er.R. and J.R. also disbelieved the allegations. Both the boys expressed anger at their sister. In light of this, it is not predictable that the three children would reside together full-time in either parent's home without conflict. Nevertheless, Mother had been the primary caretaker of the children, participating in classroom events and extra-curricular activities while Father's rotating shifts were not as conducive to his participation in these activities. The boys expressed a preference for living in Mother's

home, and each of the three children represented to the custody evaluator that they perceived Mother as the more loving and attentive parent.[1]

As such, we cannot say that the trial court's modification order is clearly erroneous.

III. Restriction of Parenting Time

Finally, Father alleges that the trial court should have restricted Mother's parenting time so that Honeycutt could not be present during Mother's parenting time with E.R.

Restriction of parenting time is governed by Indiana Code Section 31-17-4-2, which provides as follows:

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.

When interpreting a statute, the words and phrases in the statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself. State v. Eilers, 697 N.E.2d 969, 970 (Ind. Ct. App. 1998). Here, the statutory language is clear and unambiguous, and provides that parenting time may not be restricted absent a finding by the court that the interaction might endanger the child's health or significantly impair his or her emotional development. Barger v. Pate, 831 N.E.2d 758, 763 (Ind. Ct. App. 2005). A party who seeks to restrict a parent's visitation rights bears the burden of presenting evidence justifying such a restriction. Farrell v. Littell, 790 N.E.2d 612, 616 (Ind.

[1] We observe that Dr. Krupsaw recommended that Father have sole physical custody of E.R., that the parents share the physical custody of J.R. and Er.R., and that joint legal custody be maintained. He also recommended the appointment of a "parenting coordinator" for two years. (App. 75.) The fact-finder is not

Ct. App. 2003).

Here, the trial court heard conflicting evidence on the sexual abuse allegations. However, the trial court also had the benefit of an in camera interview with E.R. in making its assessment of potential harm from abuse or fear of abuse. The trial court, rather than this Court, is in the superior position to resolve factual disputes. It is also the trial court, rather than this Court, that is empowered by statute to make a finding of potential harm when warranted. The trial court did not make the requisite finding of potential harm to justify a restriction on Mother's parenting time. Father has demonstrated no reversible error in this regard.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

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required to accept opinions of experts regarding custody, but may consider such evidence. Trost-Steffen v. Steffen, 772 N.E.2d 500, 510-11 (Ind. Ct. App. 2002), trans. denied.